

IN THE SUPREME COURT OF THE STATE OF DELAWARE

AUGUSTUS H. EVANS, JR.,	§
	§ No. 399, 2009
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for Sussex County
STATE OF DELAWARE,	§ Cr. ID No. 0609011528A
	§
Plaintiff Below-	§
Appellee.	§

Submitted: October 7, 2009

Decided: November 4, 2009

Before **BERGER, JACOBS** and **RIDGELY**, Justices.

**ORDER**

This 4<sup>th</sup> day of November 2009, it appears to the Court that:

(1) The defendant-appellant, Augustus H. Evans, Jr., filed an appeal from the Superior Court’s July 6, 2009 order denying his motion for postconviction relief pursuant to Superior Court Criminal Rule 61. The plaintiff-appellee, the State of Delaware, has moved to affirm the Superior Court’s judgment on the ground that it is manifest on the face of the opening brief that the appeal is without merit.<sup>1</sup> We agree and affirm.

(2) In July 2007, Evans was found guilty by a Superior Court jury of Assault in the Second Degree, Aggravated Menacing, Resisting Arrest,

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<sup>1</sup> Supr. Ct. R. 25(a).

and two counts of Possession of a Deadly Weapon During the Commission of a Felony. Evans' convictions stemmed from his shooting of a rival drug dealer on the night of September 16, 2006 in Seaford, Delaware, and his threatening a police officer with a gun the next morning in Laurel, Delaware. Evans waived his right to counsel and represented himself at trial, with standby counsel present. He was sentenced as a habitual offender to a total of 79 years incarceration at Level V, to be suspended after 72 years for decreasing levels of supervision. This Court affirmed Evans' convictions on direct appeal.<sup>2</sup>

(3) In this appeal from the Superior Court's denial of his postconviction motion, Evans claims that a) the Superior Court abused its discretion when it denied his motion for postconviction relief; b) his detention and questioning by the Seaford police was improper in the absence of an arrest warrant; c) the affidavit of probable cause supporting his arrest by the Laurel police contained false statements; d) his counsel was ineffective for failing to raise the above issues in his direct appeal; and e) his standby counsel was not present at all critical stages of the criminal process. To the extent that Evans fails to present arguments that were previously

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<sup>2</sup> *Evans v. State*, Del. Supr., No. 471, 2007, Ridgely, J. (Feb. 13, 2009). Evans also represented himself on direct appeal.

raised, those arguments are deemed to be waived and will not be considered by this Court.<sup>3</sup>

(4) Before considering the merits of a motion under Rule 61, the Superior Court must first determine whether to apply any of the procedural bars set forth in the rule.<sup>4</sup> Because Evans unsuccessfully raised his second and third claims in his direct appeal, he is barred from raising those claims in these proceedings<sup>5</sup> unless he can demonstrate that reconsideration of those claims is warranted in the interest of justice.<sup>6</sup> In the absence of any such evidence, we conclude that the claims are procedurally barred.

(5) Evans also claims that his counsel was ineffective for failing to raise the above issues in his direct appeal and for failing to be present at all critical stages of the criminal process. Because this Court previously determined that the issues Evans claims should have been raised by counsel on appeal are without merit,<sup>7</sup> there is no factual basis for an ineffective assistance of counsel claim. Moreover, because Evans waived his constitutional right to counsel and exercised his constitutional right to

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<sup>3</sup> *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993). In his motion for postconviction relief filed in the Superior Court, Evans also argued that a photographic lineup was unduly suggestive.

<sup>4</sup> *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991).

<sup>5</sup> Super. Ct. Crim. R. 61(i)(4).

<sup>6</sup> *Id.*

<sup>7</sup> *Evans v. State*, Del. Supr., No. 471, 2007, Ridgely, J. (Feb. 13, 2009).

represent himself, he cannot now claim that his standby counsel provided constitutionally ineffective assistance.<sup>8</sup>

(6) It is manifest on the face of Evans' opening brief that this appeal is without merit because the issues presented on appeal are controlled by settled Delaware law and, to the extent that judicial discretion is implicated, there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs  
Justice

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<sup>8</sup> *Hartman v. State*, 918 A.2d 1138, 1143 (Del. 2007).